83-203

FILED
AUG 5 1983

No. _____

IN THE

Supreme Court of the United States

October Term, 1982

BERNARD BARNETT,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL A. BRENNER
Attorney for Petitioner
76 Tompkins Street
East Northport, New York 11731
(516) 757-9189

Questions Presented

1. Is "conspiracy to attempt" to possess and distribute controlled substances under 21 U.S.C. § 846 a federal crime?

2. Should the decision in *Allen v. United States*, 164 U.S. 492 (1896) be overruled or modified?

Table of Contents

Questions Presented i

Opinions Below 1

Jurisdiction 2

Constitutional Provisions and Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Writ 3

Point I – Certiorari Should Be Granted Because the Decision of the United States Court of Appeals for the Second Circuit Upholding the Validity of Count 1 of the Indictment, Which Charged a "Conspiracy to Attempt" to Possess and Distribute a Controlled Substance, is in Direct Conflict With a Decision of the United States Court of Appeals for the Fifth Circuit and Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court 3

Point II – Certiorari Should Be Granted to Settle the Issue, Which Has Divided Both the State and Federal Courts, and Which Present an Important Question of Law, Whether This Court's Decision in *Allen v. United States*, 164 U.S. 492 (1896) Has Any Continuing Validity and, to Set Guidelines for Future Cases 10

A. Overruling *Allen* 12

B. Guidelines for Future Cases 17

Conclusion 19

Appendix A - Opinion of United States Court of Appeals 1a

Appendix B - Decision of United States District Court 5a

Appendix C - Indictment Re: *United States of America v. Robert Brown and Bernard Barnett* 8a

Appendix D - Extract from Grand Jury Testimony and Indictment Re: *United States v. Romano*, 706 F.2d 370 (2nd Cir. 1983) 11a

Table of Authorities

Cases:

Allen v. United States,
164 U.S. 492 (1896) ..... i, 3, 10, 12, 13, 14, 15, 16, 17, 18

Azbill v. State,
495 P.2d 1064 (Nev. 1972) 14

Brown Transport Corp. v. Atcon Inc.,
439 U.S. 1014 (1978) 16

Bryan v. State,
280 So.2d 25 (Fla. 1973) 14

Burton v. United States,
196 U.S. 283 (1905) 15

Commonwealth v. Rodriguez,
300 N.E.2d 192 (Mass. 1973) 14, 15

Commonwealth v. Spencer,
275 A.2d 299 (Pa. 1971) 14

Donaldson v. California,
404 U.S. 968 (1971) 16

Elmer v. State,
463 P.2d 14 (Wyo. 1969) 14

Fields v. State,
487 P.2d 831 (Alaska 1971) 14

Harris v. Rivera,
454 U.S. 339 (1981) 17

Harrison v. United States,
7 F.2d 259 (2d Cir. 1925) 9

Jenkins v. United States,
380 U.S. 445 (1965) 16

Johnson v. Louisiana,
406 U.S. 356 (1972) 16

Kawakita v. United States,
190 F.2d 506 (9th Cir. 1951) 15

Kelley v. State,
187 N.W.2d 810 (Wis. 1971) 14

Kelly v. State,
310 A.2d 538 (Md. 1973) 14

Kent v. United States,
383 U.S. 541 (1966) 16

Kersey v. State,
525 S.W.2d 139 (Tenn. 1975) 14

Krulewitch v. United States,
336 U.S. 440 (1949) 9

Lias v. United States,
284 U.S. 584 (1931) 15

People v. Garner,
566 P.2d 997 (Cal. 1977, *en banc*) 12, 14, 18

People v. Mills,
268 N.E.2d 571 (Ill. 1971) 14

People v. Sullivan,
220 N.W.2d 441 (Mich. 1974) 14

Sandstrom v. Montana,
442 U.S. 510 (1979) 16

Sharplin v. State,
330 So.2d 591 (Miss. 1976) 14

State v. Alston,
243 S.E.2d 354 (N.C. 1978) 14

State v. Avcollie,
453 A.2d 418 (Conn. 1982) 15

State v. Blake,
305 A.2d 300 (N.H. 1973) 14

State v. Brown,
487 P.2d 946 (Idaho 1971) 14

State v. Champagne,
198 N.W. 2d 218 (N.D. 1972) 14

State v. Ferguson,
175 N.W.2d 57 (S.D. 1970) 14

State v. Garza,
176 N.W.2d 664 (Neb. 1970) 14

State v. Marsh,
490 P.2d 491 (Or. 1971) 14

State v. Martin,
211 N.W.2d 765 (Minn. 1973) 14

State v. Maupin,
330 N.E.2d 708 (Ohio 1975) 14

State v. Minns,
454 P.2d 355 (N.M. 1969) 14

State v. Nicholson,
315 So.2d 639 (La. 1975) 14

State v. Patriarca,
308 A.2d 300 (R.I. 1973) 14

State v. Randall,
353 P.2d 1054 (Mont. 1960) 13

State v. Thomas,
342 P.2d 197 (Ariz. 1959) 13

State v. Voeckell,
210 P.2d 972 (Ariz. 1949) 13

State v. White,
285 A.2d 832 (Me. 1972) 14

Taylor v. People,
490 P.2d 292 (Colo. 1971) 14

United States v. Bailey,
468 F.2d 652 (5th Cir. 1972) 15

United States v. Brown,
411 F.2d 930 (7th Cir. 1969) 14

United States v. Fioravanti,
412 F.2d 407 (3d Cir. 1969) 14

United States v. Mason,
658 F.2d 1263 (9th Cir. 1981) 18

United States v. Meacham,
626 F.2d 503 (5th Cir. 1980)..... 5, 6

United States v. Mowad,
641 F.2d 1067 (2d Cir. 1981) 6

United States v. Robinson,
560 F.2d 507 (2d Cir. 1977) 18

United States v. Romano,
706 F.2d 370 (2d Cir. 1983) 8

United States v. Seawell,
550 F.2d 1159 (9th Cir. 1977) 18

United States v. Skillman,
442 F.2d 542 (8th Cir. 1971)..... 14

United States v. Taliaferro,
558 F.2d 724 (4th Cir. 1977)..... 14, 15

United States v. Thomas,
449 F.2d 1177 (D.C. Cir. 1971) 14

United States v. United States Gypsum Co.,
438 U.S. 422 (1978) 16

United States v. Wynn,
415 F.2d 135 (10th Cir. 1969) 14

United States v. Zane,
495 F.2d 683 (2d Cir. 1974) 17

United States Constitution:
Fifth Amendment 2

Sixth Amendment 2

Statutes:
21 U.S.C. § 801 4

21 U.S.C. § 812 4

21 U.S.C. § 841 ..... 4, 5

21 U.S.C. § 841(a)(1) 4

21 U.S.C. § 841(b)(1)(A) 4

21 U.S.C. § 846 ..... i, 2, 4, 5, 6

28 U.S.C. § 1254(1) 2

Other Authorities:

ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, § 5.4(a) and Commentary at 146 (Approved Draft, 1968) 13, 15

Developments in the Law - Criminal Conspiracy, 72 Har. L. Rev. 920 (1959) 9

No. _____

IN THE

Supreme Court of the United States

October Term, 1982

BERNARD BARNETT,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the District Court is not officially reported and is set forth in Appendix (hereafter "Appx.") B, *infra*, pp. 5a-7a.

The summary affirmance of the Court of Appeals (Kaufman, Oakes, and Meskill, JJ.) (Appx. A, *infra*, pp. 1a-4a) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered June 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

Constitution of the United States, Fifth Amendment:

> "No person shall be...deprived of life, liberty, or property, without due process of law...."

Constitution of the United States, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to...trial...by...jury...."

21 U.S.C. § 846:

> "Any person who attempts or conspires to commit any offense described in this subchapter [21 U.S.C. § 801 *et seq.*] is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Statement of the Case

1. Count 1 of indictment 82 Cr. 651 (S.D.N.Y.) charged petitioner with a "conspiracy to attempt" to possess and distribute controlled substances, allegedly in violation of 21 U.S.C. § 846. Prior to, during, and after petitioner's conviction on this charge, counsel moved to dismiss it on the ground that there was no such federal crime. The trial court denied these motions and the Second Circuit affirmed that denial.

2. The evidence of the prosecution, in summary, demonstrated that during the summer and early fall of 1982 undercover law enforcement agents were negotiating with one Robert Brown for Brown to purchase a quantity of alleged controlled substances. On the

afternoon of September 14, 1982, the day before the transaction was to be consummated, petitioner appeared for the first time at a meeting with Brown and one of the agents (Mercado); the following morning petitioner was again with Brown when payment was made and the two were arrested.

Petitioner took the witness stand and testified that a friend had introduced him to Brown as a jewelry salesman, and Brown had told petitioner he needed someone to portray the "money man" in a jewelry transaction. Petitioner denied any knowledge that controlled substances was the true subject of the transactions engaged in.

3. The jury had considerable difficulty deciding whether to accept petitioner's testimony. After deliberating over a two-day period (which included re-reading of trial testimony and re-charges on the crimes involved) the jury reported it was having difficulty reaching a decision. Without consulting counsel, the trial court delivered a premature, unbalanced and coercive *Allen*-type charge; only sixty-nine minutes later, the jury returned with an improper compromise verdict.

The Court of Appeals rejected petitioner's claims that the *Allen*-type charge was erroneous *per se* as well as on the facts of this case.

Reasons for Granting the Writ

Point I

Certiorari Should Be Granted Because the Decision of the United States Court of Appeals for the Second Circuit Upholding the Validity of Count 1 of the Indictment, Which Charged a "Conspiracy to Attempt" to Possess and Distribute a Controlled Substance, is in Direct Conflict With a Decision of the United States Court of Appeals for the Fifth Circuit and Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Count 1 of the indictment in this case (set forth in its entirety at 8a-10a) reads, in relevant part, as follows:

> "1. From on or about the 1st day of January, 1982 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, the defendants, ROBERT BROWN and BERNARD BARNETT, and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.
>
> 2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and *attempt* to distribute and possess and *attempt* to possess with intent to distribute Schedule I narcotic drug controlled substances, to wit, heroin, the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841 (b)(1)(A) of Title 21, United States Code."
>
> * * * * *

(Title 21, United States Code, Section 812, 841(a)(1), 841 (b)(1)(A), and 846) (8a; emphasis added).

It is petitioner's position that the foregoing charged a "conspiracy to attempt" to possess and distribute a controlled substance. Since, however, that is not a federal crime, that count should have been dismissed.

Title 21 U.S.C. § 846, the statute allegedly violated here, states that it is a crime for anyone to "attempt ...*or* conspire...to commit any offense defined in this subchapter", i.e., 21 U.S.C. § 801 *et seq*; this includes 21 U.S.C. § 841 which makes it a crime to possess and/or distribute controlled substances. One may violate § 846 by attempting to violate § 841 *or* by conspiring to violate § 841, but not by doing *both*, i.e., not by "conspiring to attempt" to violate § 841.

The only two cases which have addressed this issue are in agreement with petitioner's position.

In *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980) the defendants had also been indicted for violating § 846 by "conspiring to attempt" to violate § 841. It was first noted that:

> "In order to successfully to prosecute a conspiracy, the government must be able to point to two *separate* provisions: one making the act of conspiring a crime and one making the object of the conspiring a crime (citations omitted)" *Id.* at 507 (emphasis added).

The Court then noted the government's assertion that § 846

> "simultaneously create[s] two substantive offenses and provide[s] the government with the authority to prosecute conspiracies to commit those offenses". *Id.* at 508.

This assertion was unequivocally rejected in language highly applicable to this case:

> "Without question § 846...make[s] certain attempts and conspiracies criminal. Th[is]... statute...could have been used to prosecute the appellants for conspiring to violate *or* for attempting to violate the substantive-offense provisions of the drug laws to which [it] appl[ies]. But this was not done. The government seeks yeoman's performance out of § 846...by using [it] as [a] conspiracy statute...*and* as [a] substantive-offense statute...through which the conspiracy statutes can be applied.
>
> Stripped to its essentials, the issue in this case is whether Congress, in using the words in §846... 'any offense defined in this title', intended to include the offense of attempt. We have concluded that Congress had no such intent. Acceptance of the government's position would lead to the

> conclusion that § 846...describe[d] four separate crimes..." conspiracy, attempt, conspiracy to attempt and attempt to conspire. We do not believe Congress intended to create four discrete crimes with the three words 'attempts or conspires' ". *Id.* at 508 (emphasis added).

Subsequently, in *United States v. Mowad*, 641 F.2d 1067 (2d Cir. 1981), the Second Circuit upheld a "conspiracy to attempt" count where the statute which was the alleged object of the conspiracy itself made it a violation to attempt to commit a crime. *Id.* at 1074 and n. 14. However, the Court made it clear that it would reach the same result as in *Meacham* if a "conspiracy to attempt" was charged under § 846:

> "[A] case recently decided by the Fifth Circuit, *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980)...held that a 'conspiracy to attempt' charge in an indictment failed to state an offense. In *Meacham*,...the Government attempted to combine the conspiracy and attempt provisions contained in [a] section...of the Comprehensive Drug Abuse Prevention and Control Act of 1970 to synthesize the offense of 'conspiracy to attempt' [14]

---

[14] As the Fifth Circuit noted, the statutory provisions...involved...stated: 'Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both', 21 U.S.C. § 846. Thus, the Fifth Circuit correctly observed that the Government, by combining these two statutory provisions, had generated four discrete crimes (i.e., conspiracy, attempt, conspiracy to attempt, attempt to conspire) from the three words 'attempts or conspires' 626 F.2d at 508. The Fifth Circuit quite properly questioned the Government's assertion that Congress had contemplated and intended this result when it enacted the relevant statutory provision...". *Id.* at 1074, n. 14.

In sum, while a conspiracy to attempt to violate *other* statutes may be valid, there is no such crime as a "conspiracy to attempt" to violate the controlled substances provisions of Title 21.

The trial court and appellate court did not dispute that it was improper to charge a "conspiracy to attempt" to possess or distribute controlled substances. Instead, they rejected petitioner's arguments by ruling that the indictment charged only a conspiracy to actually possess and distribute such substances, and that petitioner had only been convicted of that conspiracy.

The assertion that the indictment *charged* a conspiracy to possess and distribute controlled substances, and not a conspiracy to *attempt* to possess and distribute such substance, is refuted by the language of the indictment itself which clearly refers to a "conspiracy... [to] *attempt* to distribute and possess, and *attempt* to possess with intent to distribute" controlled substances. Furthermore, the facts of this case demonstrate beyond question that Count 1 was *intended* to charge a conspiracy to attempt.

In the usual case, law enforcement personnel agree to buy, and actually do buy, controlled substances. The resulting indictment accordingly charges the defendants in Count 1 with conspiracy to violate the laws forbidding sale, possession and distribution of controlled substances, and in Count 2 with the actual sale, etc.

This case involved a "reverse operation", i.e., undercover law enforcement personnel would attempt to sell controlled substances to, rather than attempt to buy such substances from, individuals. This reverse operation had an additional twist: no controlled substances would be present at the time of the alleged sale and flour would be used to simulate the appearance of the controlled substances. Under these circumstances no actual possession of controlled substances could take place, and that is why Count 2 of this indictment charged only an *attempt* to possess and distribute controlled substances and Count 1 only charged a "conspiracy to attempt" to possess and distribute the same.

The significance of the absence of actual controlled substances is highlighted by an indictment in another

case recently decided by the Second Circuit. *United States v. Romano*, 706 F.2d 370 (2d Cir. 1983) was also a "reverse operation". *Id.* at 372. The difference between *Romano* and this case is that what was present just prior to the controlled arrest in the *Romano* case was a controlled substance (see Grand Jury testimony of Anthony Wilson in *United States v. Romano*, at 19-20, set forth here in Appx. D, p. 11a). And that is reflected by the *indictment* handed up in *Romano*, i.e., it makes *no* reference, in the conspiracy count, to an "attempt" (see Indictment 82 Cr. 251, E.D.N.Y., set forth here in Appx. D, pp. 11a-12a).

Much of the foregoing also refutes the claim that petitioner was *convicted* of a conspiracy to possess and distribute controlled substances, rather than a conspiracy to *attempt* to possess and distribute such substances. And additional refutation is provided by all of the events that transpired at trial.

The prosecutrix herself, perhaps unintentionally but no less forcefully, supported this in her opening statement. She told the jury that "with regard to Count 1, the government's proof will show first that an agreement [i.e., conspiracy] existed between Brown, Barnett and perhaps others, and second, that the object of that agreement was to violate the narcotics laws"; and she also told the jury that "defendants Brown and Barnett violated the narcotics laws by attempting to purchase heroin" (Tr. 26). In other words the object of the conspiracy was an *attempt* to violate the narcotics laws, i.e., a "conspiracy to attempt".

In addition, the entire thrust of the prosecutrix's evidence at trial was that this was only an *attempt*. Agent Clark testified that this was a "reverse operation" (Tr. 42). And Agent Mercado made it clear that no controlled substances were actually present on September 14 and 15 and that none were ever actually going to be given to anyone (Tr. 95 - "phony kilograms, separate kilogram packages of flour that was supposed to be heroin"; Tr. 104 - "two kilograms of phony powder which was supposed to be heroin").

Furthermore, the trial judge's instructions to the jury reinforced the fact that this was a "conspiracy to attempt" prosecution. He told them that the object of the conspiracy was the violation of the law, and the violation of the law was an attempt to possess and distribute controlled substances, i.e., that this was a "conspiracy to attempt" (Tr. 407-08). And he gave the jury a copy of the indictment (Tr. 425), which said the same.

And last, but not least, in an illuminating coincidence, the Docket Sheets explicitly state that petitioner was *convicted* under Count 1 of "CONSP[IRACY] TO ATTEMPT TO DISTR[IBUTE] AND POSSESS HEROIN, 21 [USC§] 846".

Almost 60 years ago the esteemed Judge Learned Hand called the crime of conspiracy "that darling of the modern prosecutor's nursery". *Harrison v. United States*, 7 F.2d 259, 269 (2d Cir. 1925). A quarter of a century later, Mr. Justice Jackson labelled conspiracy an "elastic, sprawling and pervasive offense...[whose] history exemplifies the 'tendency of a principle to expand itself to the limit of its logic' ". *Krulewitch v. United States*, 336 U.S. 440, 445 (1949). A subsequent commentator noted that "the formlessness - both procedural and substantive - ...of conspiracy...create[s] a serious danger of unfairness to the defendant, and...consequently evoked widespread criticism from judicial and law-review commentators". *Developments in the Law - Criminal Conspiracy*, 72 Har. L. Rev. 920, 922 (1959). As a result,

> "Conspiracy indictments have been given particularly careful scrutiny:
>
> 'It is our affirmative duty to carefully scrutinize indictments under the broad language of the conspiracy statute because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the guilty' ". *United States v. Hajecate*, 683 F.2d 894, 896 (5th cir. 1982).

In violation of these principles, the conspiracy concept was stretched beyond its legal limits, and petitioner was indicted, tried and convicted of a crime that does not exist. As the number of reverse prosecutions increases, more and more prosecutors will attempt to do the same. Since the decision of the Second Circuit approving such tactics is in conflict with prior decisions of that Circuit as well as the Fifth Circuit, and since this Court has never considered this important issue of federal law, certiorari should be granted.

Point II

Certiorari Should Be Granted to Settle The Issue, Which Has Divided Both the State and Federal Courts, and Which Present an Important Question of Law, Whether This Court's Decision in *Allen v. United States*, 164 U.S. 492 (1896) Has Any Continuing Validity and, to Set Guidelines for Future Cases.

After less than 10 hours of actual deliberation over a two-day period, the jury sent in the following note:

> "It appears at this time that the jury members cannot arrive at a unanimous agreement. It seems impossible to move anywhere" (Tr. 447).

Without consulting defense counsel (but peremptorily advising counsel that he had an "exception"), the trial court delivered the following charge:

> "THE COURT: Ladies and gentlemen, last night I mentioned to you that I recognized that it was hard work to deliberate, and I do.
>
> I received your note which indicates that you are having difficulty arriving at a unanimous verdict. I am going to ask you to deliberate again.
>
> You have indicated that you could not reach a verdict. I want you to consider some other things.

This is an important case. The trial has been expensive, both in time and in money, both to the defense and to the prosecution. If you fail to agree on a verdict, the case is left open and is going to be re-tried again. Another trial can only serve to increase the cost in both time and money to both sides.

There is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried before you.

Any future jury must be selected in the same manner and from the same source that you were chosen. There is no reason to believe that the case could ever be submitted to twelve men and women more conscientious or impartial or more competent to decide it or for that matter, clearer evidence could be produced.

If a substantial majority of your member are for a conviction, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one, since it appears to make no effective impression upon the minds of the others.

On the other hand, if the majority or even a lesser number of you are for acquittal, the other jurors ought to seriously ask themselves again, and most thoughtfully, whether they do not have a reasonable doubt of the judgment which is not shared by several of their fellow jurors and whether they should distrust the weight and sufficiency of the evidence which fails to convince several of their jurors beyond a reasonable doubt.

Remember, please, at no time should any juror yield a conscientious conviction that he or she may have as to the weight and the effect of the evidence.

Remember, also, that after full deliberation of the evidence in this case, it is your duty to agree

upon a verdict, if you can do so without surrendering your conscientious convictions.

I am not going to rush you at your attempt to arrive at a verdict. On the other hand, if after a period of time you find that you are still at an impasse, I want you to let me know about that fact.

I want you to consider these factors, which I am sure you may just have overlooked in the work of deliberations. Consider all of the other things that I told you about in this case and the law.

If you can reach a verdict, do so. If you cannot, let me know". (Tr. 447-49).

Not surprisingly, after less than an hour of additional deliberation, the jury returned with a verdict acquitting petitioner of the attempt charge but convicting him of "conspiracy to attempt" (Tr. 450-51).

Petitioner respectfully requests that certiorari be granted to consider the continued validity of *Allen* and *Allen*-type charges and to establish guidelines for future cases.

A. Overruling Allen

Almost 90 years ago, in *Allen v. United States*, 164 U.S. 492 (1896) this Court approved a charge that directed the dissenting jurors in a deadlocked criminal prosecution to re-examine their position and seek to agree on a verdict. *Id.* at 501-02. Since that time, a large and growing number of state and federal jurisdictions have forbidden the use of this instruction on the ground that it "dynamites" dissenting jurors from their previously held beliefs and coerces them into compromise verdicts. It is respectfully requested that this Court grant certiorari to re-examine, in the light of "the indisputable modern trend...to abandon *Allen*" (*People v. Garner*, 566 P. 2d 997, 1003 [Cal. 1977, *en banc*]), whether *Allen* has any continued validity.

Between 1896, when *Allen* was decided, and 1959, when the first jurisdiction explicitly forbade its use, the charge was the subject of much controversy and discussion. See authorities collected in *State v. Voeckell*, 210 P.2d 972, 974-5 (Ariz. 1949).

Then, in 1959 Arizona became the first jurisdiction to forbid the *Allen* charge. In *State v. Thomas*, 342 P.2d 197 (Ariz. 1959) the Supreme Court of that State overruled prior cases and held that "the evils [of the charge] far outweigh the benefits, and [we] decree that its use shall no longer be tolerated and approved by this Court". *Id.* at 200. The following year, Montana followed suit. In *State v. Randall*, 353 P.2d 1054 (Mont. 1960) the Montana Supreme Court prohibited the *Allen* charge because:

> "The inevitable effect of the instruction would be to suggest to the minority members of the jury that they ought to surrender their own convictions and follow the majority. A vibrant, pulsating, intelligent minority is a part of our American way of life. The views of the minority often, with the passage of time, become the majority view as evidenced by the Arizona case, *supra*. The majority view on any given subject is not always the correct view.
>
> It is not in line with our practice to discourage jurors from taking a view contrary to that entertained by a majority of the jurors. It was error to give this instruction". *Id.* at 1058.

In 1968 the American Bar Association concluded "that instruction commonly referred to as the *Allen* charge or 'dynamite' charge should not be given to a jury which has been unable to agree after some deliberations. ABA Project on Minimum Standards for Criminal Justice, Standards Relating To Trial By Jury, § 5.4(a) and Commentary at 146 (Approved Draft, 1968). In the ensuing 15 years 33 additional state and federal jurisdictions outlawed the *Allen* charge and/or adopted

some form of the ABA alternative. *United States v. Wynn*, 415 F.2d 135 (10th Cir. 1969); *United States v. Brown*, 411 F.2d 930 (7th Cir. 1969); *United States v. Fioravanti*, 412 F.2d 407 (3d Cir. 1969); *State v. Minns*, 454 P.2d 355 (N.M. 1969); *Elmer v. State*, 463 P.2d 14 (Wyo. 1969); *State v. Ferguson*, 175 N.W. 2d 57 (S.D. 1970); *State v. Garza*, 176 N.W.2d 664 (Neb. 1970); *United States v. Skillman*, 442 F.2d 542 (8th Cir. 1971); *United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971); *Fields v. State*, 487 P.2d 831 (Alaska 1971); *State v. Brown*, 487 P.2d 946 (Idaho 1971); *Taylor v. People*, 490 P.2d 292 (Colo. 1971); *State v. Marsh*, 490 P.2d 491 (Or. 1971); *People v. Mills*, 268 N.E.2d 571 (Ill. 1971); *Commonwealth v. Spencer*, 275 A.2d 299 (Pa. 1971); *Kelley v. State*, 187 N.W.2d 810 (Wis. 1971); *State v. White*, 285 A.2d 832 (Me. 1972); *Azbill v. State*, 495 P.2d 1064 (Nev. 1972); *State v. Champagne*, 198 N.W.2d 218 (N.D. 1972); *Bryan v. State*, 280 So.2d 25 (Fla. 1973); *State v. Martin*, 211 N.W.2d 765 (Minn. 1973); *State v. Blake*, 305 A.2d 300 (N.H. 1973); *Commonwealth v. Rodriguez*, 300 N.E.2d 192 (Mass. 1973); *State v. Patriarca*, 308 A.2d 300 (R.I. 1973); *Kelly v. State*, 310 A.2d 538 (Md. 1973); *People v. Sullivan*, 220 N.W. 2d 441 (Mich. 1974); *State v. Nicholson*, 315 So.2d 639 (La. 1975); *State v. Maupin*, 330 N.E.2d 708 (Ohio 1975); *Kersey v. State*, 525 S.W.2d 139 (Tenn. 1975); *Sharplin v. State*, 330 So.2d 591 (Miss. 1976); *People v. Garner*, 566 P.2d 997 (Cal. 1977; *en banc*); *United States v. Taliaferro*, 558 F.2d 724 (4th Cir. 1977) and *State v. Alston*, 243 S.E.2d 354 (N.C. 1978).

Neither before, during, nor after this period of time has this Court considered or reconsidered *Allen* in any meaningful way.

It should be noted that the *Allen* decision itself suffers from both procedural and substantive flaws. No counsel appeared for Allen and the Court declared itself "somewhat embarrassed by...the absence of a brief on the part of the plaintiff in error". 164 U.S. at 493, 494. This meant that the Court decided the validity of the

"dynamite" charge without the benefit of any oral or written argument from the party who would be expected to set forth reasons against it; it is interesting to note that, as a consequence there is not a single citation accompanying the one paragraph upholding the charge. *Id.* at 501-02* In view of the foregoing, "many doubt whether the case would not be decided differently today". *United States v. Bailey*, 468 F.2d 652, 666 (5th Cir. 1972).

In *Burton v. United States*, 196 U.S. 283 (1905) the trial court had apparently charged the jury in the *Allen* language. *Id.* at 305. However, the propriety of the charge was not challenged and the Court reversed on other grounds without passing on the issue raised here. *Id.* at 306-308.

In *Lias v. United States*, 284 U.S. 584 (1931) the Court affirmed a judgment of conviction *per curiam*, citing *Allen* but without any discussion or analysis.**

In *Kawakita v. United States*, 190 F.2d 506 (9th Cir. 1951) the court rejected a claim that an *Allen* charge had coerced the verdict. *Id.* at 521-28. When this Court affirmed on a different ground, it did not discuss this issue but disposed of it (without further identification) by stating that "other errors" had been raised which were "either unsubstantial or so adequately disposed of by the Court of Appeals that we gave them no notice". 343 U.S. 717, 744 (1952).

---

* In a previous paragraph summarizing the charge, the Court had stated that it had been taken from charges approved in Connecticut and Massachusetts. *Id.* at 501. While Connecticut refuses to change this charge *(State v. Avcollie*, 453 A.2d 418, 425 [Conn. 1982]), Massachusetts long ago adopted several alternatives. *Commonwealth v. Rodriguez, supra*, 300 N.E.2d at 200-203.

** *Lias* had come out of the 4th Circuit, which has since adopted, in effect, the ABA instruction. See, e.g., *United States v. Taliaferro, supra*, 558 F.2d at 725.

In *Kent v. United States*, 383 U.S. 541 (1966), decided before the flood of cases that rejected *Allen*, the propriety of an *Allen* charge was raised but not considered. *Id.* at 552, n. 13.

In dissenting from a denial of certiorari in *Donaldson v. California*, 404 U.S. 968 (1971) Mr. Justice Douglas and Mr. Justice Marshall noted that an *Allen* charge had contributed to the finding of guilt. *Id.* at 969.

In *Johnson v. Louisiana*, 406 U.S. 356 (1972) *Allen* was referred to as supporting a finding that non-unanimous verdicts in state criminal trials did not violate any federal constitutional right. *Id.* at 361-62, 379-80.

In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) the Court referred to the fact that a "modified *Allen* charge" preceded an *ex parte* court-juror meeting that was held to be reversible error; the propriety of the *Allen* charge itself was neither raised nor considered. *Id* at 459-60.

And in dissenting from the denial of certiorari in *Brown Transport Corp. v. Atcon Inc.*, 439 U.S. 1014 (1978) Justices White and Blackmun noted a split in the circuits on *Allen* charges. *Id.* at 1018.

See, also, *Jenkins v. United States*, 380 U.S. 445 (1965) (where, in response to jury note of deadlock, court stated, *inter alia*, "You have got to reach a verdict", conviction was set aside in *per curiam* opinion on ground that it had been coerced; *Allen* was not cited).

Cf. Sandstrom v. Montana, 442 U.S. 510 (1979) ("natural consequences" instruction held violative of federal constitution; no reference to fact that *Allen* had upheld such a charge. 164 U.S. at 500).

In sum, neither in *Allen* itself nor in any of the subsequent cases citing *Allen* has there been any studied analysis of the *Allen* charge or any attempt to deal with the rising tide of criticism raised by other courts.

One other point must be noted. In the usual case, the coercive effect of an *Allen* charge will be a matter

of speculation. In this case, however, the record provides uncontrovertible proof that the verdict was improperly coerced by the *Allen* charge.

As set forth in greater detail in Point I, *supra*, count 1 of the indictment in this case charged petitioner with a conspiracy to violate the controlled substances laws and (because no such substances were actually present) count 2 charged him with an attempt to violate those laws. The only issue the jury had to decide was whether they believed petitioner's testimony that he believed jewelry and not controlled substances were involved; if they believed that testimony he would be acquitted on *both* counts and if they did not, he would be convicted on *both* counts. Simply stated, there was no legal or factual basis for an acquittal on one charge and a conviction on the other. Since the *Allen* charge was the last instruction given to the jury before it convicted petitioner of the conspiracy while acquitting him of the attempt, it is clear that the charge did cause the jurors to abandon their conscientious beliefs in favor of a compromise verdict. While such a verdict itself may not require that a conviction be set aside on grounds of repugnance or inconsistency (see, e.g., *Harris v. Rivera*, 454 U.S. 339 [1981]), such verdicts are not to be encouraged. That the *Allen* charge often leads to them (see, also, *United States v. Zane*, 495 F.2d 683, 692 [2d Cir. 1974]) is another reason it should be abandoned.

In conclusion, had this charge been delivered in one of the 35 jurisdictions, both state and federal, that have forbidden the use of the *Allen* charge, petitioner's conviction would have been summarily reversed. Petitioner respectfully requests that this Court grant certiorari, adopt the compelling logic and reasoning of the cases from these jurisdictions, and set petitioner's conviction aside.

B. Guidelines For Future Cases

Assuming that this Court grants certiorari to examine the continued validity of *Allen*, and whether

that decision is upheld, modified, or overruled, this Court should also set forth guidelines for future cases.

Some of the unresolved issues to which this Court should address itself are:

1) Should whatever charge is approved be given to the jury as part of the court's instructions *prior* to deliberations (ABA version), or only if the jury appears unable to agree on a verdict (as was done here);

2) Should the charge be given as soon as the jury indicates any difficulty in reaching a verdict (as was done here), or only after the jury has deliberated a "reasonable time" - based on the facts and circumstances of the case - and unequivocally states that it is deadlocked (see, e.g., *United States v. Mason*, 658 F.2d 1263 (9th Cir. 1981) - reversible error to give *Allen* charge where jury only deliberated about three hours over a two-day period and not merely stated it was "having problems" deliberating);

3) Should "dissenting jurors" be told to re-examine their views *(Allen)* or should this portion of the instruction be removed (ABA version);

4) Should the fact and expense of retrial be included (as was done here) or removed (see e.g., *People v. Garner, supra*, 566 P.2d at 1006);

5) Should the jury be reminded that the prosecutor has to prove guilt beyond a reasonable doubt (see, e.g., *Potter v. United States*, 691 F.2d 1275 (8th Cir. 1982) - reversible error to fail to include this in *Allen* charge), or may this be omitted (as was done here); and

6) May the charge be repeated if the jury again reports it is deadlocked (*United States v. Robinson*, 560 F.2d 507 [2d Cir. 1977]), or is such a practice reversible error (*United States v. Seawell*, 550 F.2d 1159 [9th Cir. 1977]).

Conclusion

For the above-stated reasons, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JOEL A. BRENNER
Attorney for Petitioner
76 Tompkins Street
East Northport, NY 11731
(516) 757-9189

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

83-1037

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of June, one thousand nine hundred and eighty-three.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

BERNARD BARNETT,
Defendant-Appellant.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE JAMES L. OAKES,
HONORABLE THOMAS J. MESKILL,
Circuit Judges

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

---

1. Barnett argues he was impermissibly convicted of "conspiracy to attempt to distribute" narcotics. This claim is baseless. Count One of the indictment alleged only a conspiracy to violate the substantive provisions in issue. Count Two charged an attempt. The prosecutrix referred to this distinction in her closing statement to the jury, and the district court succinctly instructed the jury that

> Count 1 charges that the defendants Robert Brown, Bernard Barnett and others conspired to violate the federal laws prohibiting the distribution of narcotics....
>
> * * * * *
>
> Here we have, and I am summing up, the objects of the conspiracy charged in this indictment were to distribute narcotics and possess narcotics with an intent to distribute it [sic].

Thus, the indictment charged, and the judge informed the jury, that appellant had participated in a conspiracy to distribute, not a conspiracy to attempt to distribute, narcotics. Moreover, the Government's evidence established Barnett played a significant role, as the "money man," in the narcotics transactions negotiated among Brown, Barnett, and Agent Julio Mercado. The September 14 meeting of those three men established appellant and Brown were conspiring to purchase narcotics from the agents. The jury was therefore aware it was to pass upon the Government's allegation Barnett had conspired to distribute and possess with intent to distribute narcotics.

2. Barnett also contends Judge Duffy impermissibly demonstrated his belief in appellant's guilt. The one relatively brief and moderate line of questioning concerning appellant's explanation of the September 15, 1982 conversation is far removed from the "repeated, lengthy and occasionally angry interventions" which might compel reversal. *United States v. Fernandez*, 480 F.2d 726, 737 (2d Cir. 1973).

3. Appellant further argues the district court improperly coerced the jury into returning a compromise verdict. Judge Duffy's *Allen* charge, *Allen v. United States*, 164 U.S. 492, 501-02 (1896), was, however, balanced. By warning that under no circumstances may a juror relinquish a conscientious judgment, by indicating he would not rush the jury, and by stating that the minority of jurors, whether they presently believed Barnett's guilt had or had not been proven, should simply reconsider in light of the position taken by their colleagues, Judge Duffy properly exercised his discretion to urge continued "deliberations toward a verdict, if possible, in order to avoid the expense and delay of a new trial," *United States v. Bermudez*, 526 F.2d 89, 100 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976), and Barnett was not prejudiced. *United States v. Robinson*, 560 F.2d 507, 517-18 (2d Cir. 1977) (en banc).

4. Also without merit is appellant's claim that the conspiracy conviction and the Count Two attempt acquittal are inconsistent, requiring reversal. It is well established that even plainly inconsistent verdicts (which these were not), simultaneously rendered, are the prerogative of the jury. *United States v. Ford*, 603 F.2d 1043, 1047 (2d Cir. 1979); *Steckler v. United States*, 7 F.2d 59 (2d cir. 1925) (L. Hand, J.).

5. Appellant's other contentions are equally without merit.

6. Accordingly, the judgment of conviction is affirmed.

IRVING R. KAUFMAN,

JAMES L. OAKES,

THOMAS J. MESKILL,
Circuit Judges.

Appendix B
Decision of United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Cr. 0651

UNITED STATES OF AMERICA

v.

BERNARD BARNETT

Hon. Kevin Duffy, U.S.D.J.

Bernard Barnett was convicted by a jury on December 7, 1982, of conspiracy to distribute narcotics, and he was acquitted by the same jury of attempting to distribute narcotics. Mr. Barnett moves post-conviction for a setting aside of the verdict because (i) the verdict is inconsistent, and/or (ii) it is not criminal to conspire to attempt to violate U.S.C. § 841. I deny Mr. Barnett's motion in both respects.

I begin first with Mr. Barnett's assertion that because it is not criminal to conspire to attempt to violate section 841, his conviction should be set aside. Barnett was charged and convicted on Count One of an indictment that states:

> From on or about the 1st day of January, 1982 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, the defendants, ROBERT BROWN and BERNARD BARNETT, and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections

812, 841 (a)(1) and 841(b)(1)(A) of Title 21, United States Code.

Hence, it is unnecessary to determine whether conspiring to attempt to violate section 841 is a crime because Barnett was convicted of conspiracy to distribute narcotics.

Mr. Barnett may be claiming that because he was charged in Count Two with attempting to violate section 841, the object crime of the conspiracy in Count One must have been conspiring to attempt. This is wrong. The indictment explicitly states that the object of the conspiracy was a violation and not an attempted violation of section 841.

Mr. Barnett also claims that the jury verdict was inconsistent. Even accepting this as true, it does not warrant upsetting the jury's verdict in this Circuit:

> [T]he substance of [the defendant's] complaint is that the jury rendered inconsistent verdicts. Even if the wire fraud and securities fraud counts were, as [defendant] alleges, multiplicious, no interest protected by the Double Jeopardy Clause is violated by [defendant's] simultaneous conviction and acquittal on those charges.
>
> If taken as an objection to an alleged inconsistency in the jury's verdict, [defendant's] claim, even if accurate, is squarely controlled by *United States v. Zane*, 495 F.2d 683, 690, *cert. denied*, 419 U.S. 895, 95 S.Ct. 174, 42 L.Ed.2d 139 (1974), where we stated,
>
> > It is well settled that even plainly, inconsistent jury verdicts, simultaneously rendered are the jury's prerogative. The rule, as announced by Judge Learned Hand in *Steckler v. United States*, 7 F.2d 59 (2d Cir. 1925), and confirmed by Justice Holmes in *Dunn v. United States*, 284 U.S. 390 [52 S.Ct.

> 189, 76 L.Ed. 520] (1932), is that consistency in jury verdicts is not required. That the rule retains all its vitality today is evident from our steadfast adherence to it.

U.S. v. Ford, 603 F.2d 1043, 1047 (2d Cir. 1979). Defendant's second asserted ground for reversing his conviction, therefore, also must fail.

In sum, defendant's motion to set aside the jury's guilty verdict is denied.

SO ORDERED.

DATED: New York, New York
January , 1983

KEVIN THOMAS DUFFY, U.S.D.J.

Appendix C
Indictment Re: United States of America v. Robert Brown and Bernard Barnett

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

ROBERT BROWN and
BERNARD BARNETT,

Defendants.

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of January, 1982 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, the defendants, ROBERT BROWN and BERNARD BARNETT, and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and attempt to distribute and possess and attempt to possess with intent to distribute Schedule I narcotic drug controlled substances, to wit, heroin, the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

Appendix C - Indictment Re: United States of America v. Robert Brown and Bernard Barnett

1. On or about August 24, 1982, the defendant, ROBERT BROWN, met with another individual to discuss the purchase of heroin.

2. On or about September 9, 1982, the defendant, ROBERT BROWN, agreed to purchase two kilograms of heroin from another individual for $250.00.

3. On or about September 15, 1982, the defendants, ROBERT BROWN and BERNARD BARNETT, met with another individual to discuss the purchase of heroin.

4. On or about September 15, 1982, the defendant, BERNARD BARNETT, carried a bag containing $100,000.

(Title 21, United States Code, Section 812, 841(a)(1), 841(b)(1)(A), and 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 15th day of September, 1982, in the Southern District of New York, the defendants, ROBERT BROWN and BERNARD BARNETT, unlawfully, intentionally and knowingly did attempt to distribute and possess with intent to distribute a Schedule I controlled substance, to wit, two kilograms of heroin.

(Title 21, United States Code, Section 812, 841(a)(1), 841(b)(1)(A), and 846 and 2.)

Appendix C - Indictment Re: United States of America v. Robert Brown and Bernard Barnett

COUNT THREE

The Grand Jury further charges:

On or about the 29th day of July, 1982 in the Southern District of New York, the defendant, ROBERT BROWN, unlawfully and knowingly did possess with intent to distribute a Schedule I controlled substance, to wit, approximately one gram (net weight) of heroin.

(Title 21, United States Code, Section 812, 841(a)(1), 841(b)(1)(A).)

JOHN S. MARTIN, JR.
United States Attorney

FOREMAN

Appendix D
Extract From Grand Jury Testimony and Indictment Re: United States v. Romano, 706 F.2d 370 (2nd Cir. 1983)

* * * Q After you met with Romano and Glorioso and the informant in the lobby, what happened?

A Well, Glorioso remained outside to watch Romano's car.

Romano, myself and the informant went up to the -- what we call "undercover hotel room". At this point I showed in the presence of the informant and an additional undercover agent who was posing as a bodyguard, ten half kilogram plastic bags containing pure heroin.

Q Where had this heroin come from?

A The heroin actually -- I obtained it from the DEA laboratory here in New York.

It was actually previously confiscated heroin.

Q And you followed, I assume, DEA procedures in obtaining this heroin and getting its release from the lab; is that correct?

A Exactly.

Q It was in fact real heroin.

A It was real heroin and ranged in purity from 95 to 98 per cent.

* * * * *

Indictment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

against

MATTEO ROMANO and
ARMANDO GLORIOSO,

Defendants.

Appendix D - Extract From Grand Jury Testimony and Indictment Re: United States v. Romano, 706 F.2d 370 (2nd Cir. 1983)

THE GRAND JURY CHARGES:

From on or about April 16, 1982 until May 10, 1982, both dates being approximate and inclusive, the defendants MATTEO ROMANO and ARMANDO GLORIOSO, together with others unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Title 21, United States Code, Section 841(a)(1).

1. It was part of said conspiracy that the defendants and others would possess with intent to distribute substantial quantities of heroin hydrochloride, a Schedule I narcotic drug controlled substance.

2. It was further part of said conspiracy that the defendants would possess substantial amounts of American currency and other things of value in order to effectuate the objects of said conspiracy.

3. It was further part of said conspiracy that the defendants would conceal the existence of the conspiracy and take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Section 846).

A TRUE BILL.

_____

FOREMAN

_____

EDWARD R. KORMAN
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK